

05-711 NOV 28 2005

No. OFFICE OF THE CLERK

---

In the  
**Supreme Court of the United States**

---

JUDY GREENE, Executrix of the Estate  
of Donald Greene, deceased,

*Petitioner,*

v.

B.F. GOODRICH AVIONICS SYSTEMS, INC.,  
d/b/a B.F. Goodrich Aerospace, Avionics  
and Lighting Division, n/k/a Goodrich  
Avionics Systems, Inc.,

*Respondent.*

---

On Petition for a Writ of Certiorari to the  
United States Court of Appeals for the Sixth Circuit

---

**PETITION FOR WRIT OF CERTIORARI**

---

STANLEY M. CHESLEY

PAUL M. DE MARCO

*Counsel of Record*

JEAN M. GEOPPINGER

WAITE, SCHNEIDER, BAYLESS &

CHESLEY CO., L.P.A.

1513 FOURTH & VINE TOWER

ONE WEST FOURTH STREET

CINCINNATI, OH 45202

(513) 621-0267

## QUESTIONS PRESENTED

Whether the United States Court of Appeals for the Sixth Circuit erred in holding that federal aviation law preempted plaintiff's state law failure to warn claim.

Whether the Sixth Circuit disregarded this Court's precedents by improperly reweighing the evidence under the guise of assessing its legal sufficiency to support the jury verdict.

**PARTIES TO THE PROCEEDING**

Petitioner, plaintiff Judy Greene, is the representative of the estate of her late husband, Donald Greene, who was killed in a medevac helicopter crash on June 4, 1999 in Jackson, Kentucky. Respondent, defendant B.F. Goodrich Avionic Systems, Inc., is the manufacturer of the vertical gyroscope installed in the medevac helicopter.

# TABLE OF CONTENTS

QUESTIONS PRESENTED .....	i
PARTIES TO THE PROCEEDINGS .....	ii
TABLE OF CONTENTS .....	iii
TABLE OF AUTHORITIES .....	v
OPINIONS BELOW .....	1
JURISDICTION .....	1
REGULATIONS INVOLVED IN THIS CASE .....	1
STATEMENT OF THE CASE .....	2
REASONS FOR GRANTING THE PETITION .....	8
<p>I. THE SIXTH CIRCUIT'S HOLDING THAT PLAINTIFF'S FAILURE TO WARN CLAIM WAS PREEMPTED BY FEDERAL LAW INVOLVES AN EXCEPTIONALLY IMPORTANT ISSUE THAT HAS DIVIDED THE CIRCUITS ADDRESSING IT. THE CIRCUIT SPLIT ON THIS ISSUE WARRANTS REVIEW BY THIS COURT IN ORDER TO BRING CONSISTENCY AMONG THE CIRCUITS AND THE DISTRICT COURTS ..</p>	
	9

II. IN HOLDING THAT THE EVIDENCE WAS LEGALLY INSUFFICIENT TO SUPPORT A FINDING OF DEFECT, THE SIXTH CIRCUIT IMPROPERLY REWEIGHED THE EVIDENCE UNDER THE GUISE OF ASSESSING ITS LEGAL SUFFICIENCY TO SUPPORT THE JURY VERDICT, IN VIOLATION OF PRECEDENTS ESTABLISHED BY THIS COURT, THE OTHER CIRCUITS, AND THE SIXTH CIRCUIT ITSELF . . . . .	11
---	----

**APPENDIX**

Appendix A - Sixth Circuit Order Denying Rehearing and Rehearing En Banc - 8/30/05 . . . . .	1a
---	----

Appendix B - Sixth Circuit Opinion - 5/20/05 . . . . .	3a
--	----

Appendix C - District Court Memorandum Opinion and Order - 11/19/02 . . . . .	31a
--	-----

Appendix D - District Court Memorandum Opinion and Order - 8/26/02 . . . . .	39a
---	-----

## TABLE OF AUTHORITIES

### Cases

<i>Abdullah v. American Airlines, Inc.</i> , 181 F.3d 363 (3d Cir. 1999) . . . . .	9
<i>Alshrafi v. American Airlines, Inc.</i> , 321 F.Supp.2d 150 (D. Mass. 2004) . . . . .	10
<i>Cartegen v. Continental Airlines, Inc.</i> , 10 F.Supp.2d 677 (S.D. Texas 1997) . . . . .	10
<i>Cleveland v. Piper Aircraft, Inc.</i> , 985 F.2d 1438 (10 <sup>th</sup> Cir. 1993) . . . . .	8, 9
<i>French v. Pan Am. Express</i> , 869 F.2d 1 (1 <sup>st</sup> Cir. 1989) . . . . .	9
<i>Hoagland v. Town of Clear Lake</i> , 2004 WL 2634353 (N.D. Ind. 2004) . . . . .	10
<i>Hodges v. United Airlines, Inc.</i> , 44 F.3d 334 (5 <sup>th</sup> Cir. 1995) . . . . .	8, 10
<i>Levy v. Delta Airlines, Inc.</i> , 2004 WL 2222149 (S.D.N.Y. 2004) . . . . .	10
<i>Margolis v. United Airlines, Inc.</i> , 811 F.Supp. 318 (E.D. Mich. 1993) . . . . .	10
<i>Moore v. Kuka Welding Sys.</i> , 171 F.3d 1073 (6 <sup>th</sup> Cir. 1999) . . . . .	8
<i>Neely v. Martin K. Eby Const. Co.</i> , 386 U.S. 317 (1967) . . . . .	20

<i>Pratt v. National Distillers &amp; Chem. Corp.</i> , 853 F.2d 1329 (6 <sup>th</sup> Cir. 1988) . . . . .	8
<i>Reeves v. Sanderson Plumbing Prod., Inc.</i> , 530 U.S. 133 (2000) . . . . .	8
<i>Schumacher v. Amalgamated Leasing, Inc.</i> , 806 N.E.2d 189 (Ohio Ct. App. 2004) . . . . .	10
<i>Shupert v. Continental Airlines Inc.</i> , 2004 WL 784859 (S.D.N.Y. 2004) . . . . .	10
<i>Weisgram v. Marley Company</i> , 528 U.S. 440 (6 <sup>th</sup> Cir. 1975) . . . . .	12
<i>Zenith Radio Corp. v. Hazeltine Research, Inc.</i> , 395 U.S. 100 (1969) . . . . .	11
<b>Statutes</b>	
28 U.S.C. § 1254 . . . . .	1
<b>Regulations</b>	
14 C.F.R. § 145.63(a) (1999) . . . . .	1, 6, 16, 17
14 C.F.R. § 145.63(b) (1999) . . . . .	2, 17
<b>Rules</b>	
Fed. R. Civ. P. 50(d) . . . . .	19

## OPINIONS BELOW

The order of the United States Court of Appeals for the Sixth Circuit denying plaintiff/petitioner's petition for rehearing *en banc* in this case is reproduced in Appendix A, p. 1a. The decision of the United States Court of Appeals for the Sixth Circuit overturning the jury's verdict, reversing the judgment of the United States District Court for the Eastern District of Kentucky, and remanding the case with instructions to enter judgment in favor of B.F. Goodrich and dismiss the case is reported at 409 F.3d 784 and reproduced in Appendix B, p. 3a. The opinion and order of the United States District Court for the Eastern District of Kentucky denying defendant's motion for judgment notwithstanding the verdict or, in the alternative, for a new trial is unreported and is reproduced in Appendix C, p. 31a. The opinion and order of the United States District Court for the Eastern District of Kentucky denying in part and granting in part defendant's motion for summary judgment is unreported and reproduced in Appendix D, p. 39a.

## JURISDICTION

The order of the United States Court of Appeals for the Sixth Circuit denying plaintiff/petitioner's petition for rehearing *en banc* was entered on August 30, 2005. This Court has jurisdiction to review the judgment of the Sixth Circuit by writ of certiorari pursuant to 28 U.S.C. § 1254.

## REGULATIONS INVOLVED IN THIS CASE

### 14 C.F.R. § 145.63(a) (1999):

Each certificated domestic repair station shall report to the Administrator within 72 hours after it discovers



any serious defect in, or other recurring unairworthy condition of, an aircraft, powerplant, or propeller, or any component of any of them. The report shall be made on a form and in a manner prescribed by the Administrator, describing the defect or malfunction completely without withholding any pertinent information.

**14 C.F.R. § 145.63(b) (1999):**

In any case where the filing of a report under paragraph (a) of this section might prejudice the repair station, it shall refer the matter to the Administrator for a determination as to whether it must be reported. If the defect or malfunction could result in an imminent hazard to flight, the repair station shall use the most expeditious method it can to inform the Administrator.

**STATEMENT OF THE CASE**

On June 14, 1999, petitioner Judy Greene's husband Donald Greene ("Greene"), a helicopter pilot, was killed along with fellow pilot Ernest Jones ("Jones") and two emergency medical technicians when their University of Kentucky Medical Center medevac helicopter – N2743E, operated by Petroleum Helicopters, Inc. ("PHI") – crashed into a mountain in dark, foggy conditions less than two minutes after taking off from Julian Carroll Airport in Jackson, Kentucky. *Greene v. B.F. Goodrich Avionics Systems, Inc.*, 409 F.3d 784, 786 (6<sup>th</sup> Cir. 2005), Appendix B, p. 5a. The case was appealed to the Sixth Circuit following a jury verdict in plaintiff's favor on her strict product liability claim against B.F. Goodrich ("Goodrich"), the manufacturer of a critical vertical gyroscope whose

failure, according to the jury, was a substantial factor in causing the crash. Plaintiff cross-appealed, arguing that the district court erred in dismissing her failure to warn claim based on federal preemption.

Plaintiff's product liability claim was based on evidence indicating in-flight failure of the Goodrich-made gyroscope that fed data to Greene's Attitude Direction Indicator ("ADI"), a guidance instrument in the cockpit that tells the pilot, *inter alia*, if the aircraft is climbing or descending, rolling right or left, in short, its "attitude." An ADI is arguably the most critical guidance instrument on which a pilot flying in darkness and fog must rely. Because they respond to emergencies, medevac pilots often must fly in "instrument meteorological conditions" such as the heavy fog, darkness, and quarter-mile visibility in which Greene and Jones took off that night. The only way for pilots to fly in such conditions is to follow their instruments, including the ADI.

This is precisely what Greene and Jones were doing as they took off from Julian Carroll Airport at 10:06:41 p.m. on June 14, 1999. Julian Carroll Airport sits atop a mountain at an elevation of 1,381 feet, surrounded by other mountains. The cockpit voice recording revealed that, six minutes before Greene and Jones took off, Air Traffic Control ("ATC") assigned them an altitude of 4,000 feet, which required them to climb more than 2,600 feet after take-off. Because the crash site is at 1,000 feet, it is an established fact that Greene and Jones actually had *descended* to a point at least 400 feet below their take-off point, instead of climbing out to their assigned altitude. In laymen's terms, two very experienced pilots unknowingly had flown their helicopter downward into a "hole" surrounded on all sides by mountains.

The cockpit voice recording documents the two pilots' recognition of this fact and their reactions to it. About a minute and a quarter after take-off, Jones confirmed to ATC that they intended to climb to 4,000 feet, their assigned altitude. Nineteen seconds after that, however, Jones told Greene, "OK you're in a right hand turn and descending." *Id.* at 786-87, Appendix B, p. 5a. This was the first mention on the recording that the helicopter was *descending*. The problem was obvious: they were descending amid mountains, when they were supposed to be climbing above the mountains. Greene, who not only had been a pilot for seventeen years but also was an aircraft mechanic, took just two seconds to diagnose the problem. His statement to Jones "OK, I think my gyro just quit" evinced his quick recognition that, in descending when he should have been climbing, he must have been following a "lying" instrument - i.e., an ADI that, previously unknown to him, had been receiving inaccurate data from the vertical gyroscope attached to it. *Id.* at 787, Appendix B, p. 5a. For the next five seconds, Greene apparently scanned the instruments, attempting to determine the helicopter's real attitude and position. Evidently still not confident of either, Greene asked Jones, who had a different ADI in front of him, "You have the controls?" *Id.* Jones' response, which was to reconfirm their descent and to tell Greene "level us off," indicated that Jones did not take control of the helicopter. *Id.* at 787, Appendix B, pp. 5a-6a. Ambient noise on the cockpit voice recording indicates that full power, which would tend to reverse the helicopter's descent, was applied eight seconds before impact. A total of nineteen seconds elapsed between Greene's statement that his gyroscope quit and the helicopter's impact with the side of the mountain. *Id.*

Although none of the vertical gyroscopes from the helicopter were found after the crash, the National

Transportation Safety Board ("NTSB") found and tested one of N2743E's ADIs. According to the NTSB, "[e]xamination of the needle indicator to the attitude direction indicated . . . showed that it was pointing to a position *between level flight and a 2-degree right roll* when received."<sup>1</sup> Thus, the ADI reading at the time of impact indicated that the helicopter was within two degrees of "wings level." This reading could not be accurate, as plainly demonstrated by the crash kinematics reported by the NTSB, i.e., the physical evidence at the crash site, in the nature of impact marks on trees and scars on the hillside:

On-site investigation revealed the helicopter had impacted rising terrain on a tree-covered slope, at an elevation of about 1,000 feet. The tops of the trees on the top of the ridge were estimated to be about 1,200 feet high. The average slope of the terrain was between 45 degrees and 55 degrees. Broken tree limbs and branches at the accident site were fractured in a *10-15 degree downward attitude, with the left side of the broken branches about 10-15 degrees lower than the right side.*

(Emphasis added.)

In addition to the physical evidence from the crash, Goodrich's vertical gyroscopes in PHI helicopters had an extensive, documented history of failure due to any number of causes (e.g., roll chatters, pitch chatters, failure to erect, precessing, ratcheting in flight, kicks and tumbles). PHI

---

<sup>1</sup> Due to impact forces and post-crash thermal damage, the needle indicator on the recovered ADI was "frozen" in place when N2743E crashed.